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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 BOBBY WELLS,

11 Plaintiff,

12 v.

13 MICHAEL ALBERTS,

14 Defendant.

CASE NO. C13-5883 BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR:

DECEMBER 20, 2013

15 The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States
16 Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. §
17 636(b)(1)(A) and (B), and Magistrate Judge Rules MJR3 and MJR4.

18 The Court recommends dismissal of this action prior to service with the dismissal
19 counting as a strike pursuant to 28 U.S.C. § 1915(e)(1) and (g). The Court has examined the
20 original complaint, the amended complaint, and the contents of the file in a prior case *Wells v.*
21 *Department of Corrections*, 13-0234RJB/KLS. Plaintiff fails to state a claim for violation of his
22 First or Fourteenth amendment rights because his letter to a local newspaper was threatening in
23 nature and not protected speech. Further, plaintiff's allegation that two defendants committed
24

perjury in the prior action fails to state a federal claim. This action is subject to dismissal on screening pursuant to 28. U.S.C. § 1915A(b)(1).

FACTS

Plaintiff alleges in his amended complaint that defendant Albert lowered plaintiff's custody level and transferred plaintiff in retaliation for a letter that plaintiff attempted to send to a local newspaper (ECF No. 10, amended complaint). Plaintiff also alleges that two people committed perjury in the prior action when they represented to the Court that plaintiff could file a grievance regarding retaliation (ECF No. 8 and 10). Plaintiff only raised the perjury claim in the original complaint (ECF No. 8). The Court entered an order to show cause because the civil rights act does not recognize a cause of action based solely on the allegation that a person, even a state employee, has committed perjury. *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).

The Court has examined the content of plaintiff's letter that was before the Court in plaintiff's prior action. (*Wells v Washington Department of Corrections*, 13-0234RJB/KLS (ECF No. 35 p. 3)) Plaintiff stated:

To: The Editor,

Dear Clark County Residents,

I thought it would be most courteous if I write this letter to introduce myself since my new work assignment out of Larch Corrections Center will not be inside the prison but at various places right in your community. School owned properties, parks and public trails where families recreate, and, maybe that field near your home.

According to King County police, prosecutors, and Department of Corrections classification staff I am a high-violent, security threat who they suspect may even be an escape risk. The police would add that I am one of the most "willful and dangerous" chase subjects some of them have pursued.

To learn more about what D.O.C. records tell about me call the prison and ask (360) 260-6300. I'm glad my days of incarceration need not be spent inside the confines of some boring old prison but, out where some FUN might be found.

1 What a sweet thing this is! I promise that I will only mock your wives and
 2 mothers I happen to see around town with all the respect I am capable of showing.
 I mean the utmost now. Whatever assumptions you hold about the type of person
 sent to prison. May they not be disappointed by me.

3 Bobby Wells #735091
 4 Larch Corrections Center

5 Plaintiff's prior action was dismissed without prejudice for failure to exhaust
 6 administrative remedies (*Wells v Washington Department of Corrections*, 13-0234RJB/KLS
 7 (ECF No. 37)). At the time the Court ordered service in that case it did not have the contents of
 8 plaintiff's letter before it. The letter was attached as an exhibit to the answer (*Wells v*
 9 *Washington Department of Corrections*, 13-0234RJB/KLS (ECF No. 18, Exhibit 1)).

10 DISCUSSION

11 A. First amendment claims.

12 Because this case is still at the screening level the Court has not applied the four factor
 13 test set forth in *Turner v. Safley* to determine if prison officials actions were constitutional.
 14 *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Under the first factor of that test prison officials
 15 would identify the penological reasons for not allowing plaintiff to mail this correspondence and
 16 for the decision to transfer him and change his custody level. Because the defendants have not
 17 been served, they cannot identify the reasons for their actions. The Court will use the less
 18 stringent test that any person must meet for stating a claim for violating a First Amendment right.

19 The Ninth Circuit has held that:

20 "The protections afforded by the First Amendment, however, are not absolute."
Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).
 21 The Supreme Court has recognized a "true threat" exception to the First
 Amendment. *See, e.g., Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399,
 22 22 L.Ed.2d 664 (1969); *see also Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367,
 371-72 (9th Cir.1996). A true threat is "an expression of an intention to inflict
 23 evil, injury, or damage on another" and such speech receives no First Amendment
 protection. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of*
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1 *Life Activists*, 290 F.3d 1058, 1075 (9th Cir.2002) (*en banc*) (quotation marks and
2 citation omitted).

3 *Fogel v. Collins*, 531 F.3d 824, 830 (9th Cir. 2008).

4 The Ninth Circuit considers both an objective and a subjective test to determine if a
5 message is a “true threat.” *Fogel v. Collins*, 531 F.3d 824, 831-33 (9th Cir. 2008). Under the
6 objective test the Court considers the context in which the message is sent and if a reasonable
7 person receiving the message would perceive the message as a threat. *Id.*

8 Applying the objective standard the Court finds that plaintiff’s letter to the local news
9 paper contains very thinly veiled threats that he will behave poorly if sent into the community.
10 Plaintiff is an inmate convicted of felony crimes. He is threatening misbehavior if released into
11 the community and mentions schools, parks, and places where families recreate as places where
12 he may be working. These places all become potential targets where he could carry out his
13 threats of misbehavior. Plaintiff also specifically mentions wives and mothers as targets for his
14 conduct. The Court concludes that a reasonable person reading plaintiff letter would perceive the
15 letter as a threat.

16 Under the subjective standard the Court must consider plaintiff’s intent in authoring the
17 letter. *Fogel v. Collins*, 531 F.3d at 832. Plaintiff’s intent is clear when the Court considers the
18 context in which the letter was made. Plaintiff had been transferred to a minimum security camp
19 and apparently he did not want to be there. Plaintiff is threatening misbehavior if he is allowed
20 outside the prison. Plaintiff intended to intimidate the public and embarrass prison officials. His
21 letter certainly caused prison officials to reconsider if he was a fit subject for the custody level he
22 had and it caused them to transfer him to a higher custody facility. The Court concludes that
23 plaintiff intended that his letter be perceived as a threat. Accordingly, under either the objective
24 or subjective test, the Court finds plaintiff’s speech is not entitled to First Amendment protection.

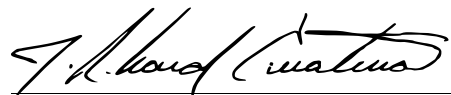
1 Having concluded that plaintiff's message is not entitled to First Amendment protection
 2 the Court recommends this portion of the action be dismissed on screening pursuant 28 U.S.C. §
 3 1915A(b)(1) for failure to state a claim.

4 B. Alleged perjury in a prior action.

5 Plaintiff alleges two persons committed perjury in his prior action by representing to the
 6 Court that plaintiff could file a grievance regarding this situation. The civil rights act does not
 7 recognize a cause of action based solely on the allegation that a person, even a state employee, has
 8 committed perjury. *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983). Witnesses are absolutely immune
 9 from damages liability based on their testimony. *Id.* Accordingly, plaintiff's claim of alleged
 10 perjury is also subject to dismissal prior to service pursuant 28 U.S.C. § 1915A(b)(1) for failure
 11 to state a claim.

12 The Court recommends that this action be dismissed on screening prior to service for
 13 failure to state a claim and that the dismissal count as a strike pursuant to 28 U.S.C. § 1915(e)(2)
 14 and (g). Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
 15 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
 16 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
 17 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
 18 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on
 19 December 20, 2013, as noted in the caption.

20 Dated this 21st day of November, 2013.

21 

22 J. Richard Creatura
 23 United States Magistrate Judge
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